No. 88-1

IN THE

Supreme Court of the United States

October Term, 1988

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,

Respondents.

On Writ of Certiorari To The United States Court of Appeals for the Third Circuit

ALLIED PILOTS ASSOCIATION BRIEF *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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This brief is submitted on behalf of the Allied Pilots Association (APA), an organization certified to represent American Airlines' pilots and certain "American Eagle" pilots, with the consent of the parties as provided for in the Rules of this Court. The airline and its pilots are governed by the Railway Labor Act.

The Company and its pilot employees had for many years worked together in establishing and fostering an Employment Assistance Program designed to detect and assist pilots who were victims of substance abuse, particu-

larly alcohol use. In 1984 the Company published rules, effectively prohibiting drug use by its pilots and other employees. APA, as the representative of the American pilots, was at least equally concerned with the Company's management for the safe operation of the Company's flights; for, as it is said ironically among the pilots themselves, "It is the pilot who gets to the scene of the accident first." It has always been clear that out of safety concerns for the public interest and for their own personal interest as well, the pilots continue to cooperate in an effective self-policing and detection program aimed at both drugs and alcohol use.

In March 1988, the Company, with little or no notice, composed new rules which imposed urine and blood testing requirements for the pilot group. The Company, unbeknown to APA, had been working on this program months before its announcement and had, in fact, retained the services of medical consultants to aid them. The key features of the American program involved either the addition of new obligations for the pilots or the modification of existing procedures for the detection and control of substance/alcohol abuse. The Company has taken the position that it is under no obligation to bargain concerning these rule changes and does not intend to do so. APA has filed suit in the Federal District Court for the Northern District of Texas where the case is still pending. This *Amicus* Brief is being submitted because there are certain fundamental issues of principle that affect all employee groups under the Railway Labor Act.

The petitioner's brief is founded on an erroneous premise which is wholly at odds with the purpose and de-

sign of the Railway Labor Act. That brief suggests that the carriers have a free hand in dealing with all labor relations matters which are either not traceable to the contract or related to customary practice (Brief p. 20). In those latter instances, the carrier concedes that there may be room to challenge its actions through the minor dispute settlement procedures. However, consistent with its thesis, the carrier would insist that all innovative decisions are its alone, regardless of the impact its decision may have on the working conditions of its employees.

The carrier's approach to management of the nation's transportation system is inconsistent with the origins of the Railway Labor Act. That statute is, perhaps, unique in the annals of labor legislation. The background of the Act is briefly set out in "The Railway Labor Act at Fifty: Collective Bargaining in the Railroad and Airline Industries" (National Mediation Board 1976). In the first chapter, written by Professor Charles M. Rehmus, the author points out that the original "proposal" had been drafted by the attorney of the railway labor organizations, Donald R. Richberg, and his assistant, David E. Lilienthal. Thus, it had the support of the railway labor organizations and was also backed by Samuel Gompers of the AFL (p. 7).

Congress did not act on the original proposal but, "During 1925, a committee of railway executives met with union representatives and a draft bill similar to the earlier . . . proposal was agreed upon." (p. 8)

The bill was presented jointly to Congress in January 1926 and Richberg testified:

> "I want to emphasize again that this bill is the product of a negotiation between employers and em-

ployees which is unparalleled, I believe, in the history of American industrial relations.

For the first time representatives of a great majority of all the employers and all the employees of one industry conferred for several months for the purpose of creating by agreement a machinery for the peaceful and prompt adjustment of both major and minor disagreements that might impair the efficiency of operations or interrupt the service they render to the community. They are now asking to have this agreement written into law, not for the purpose of having governmental power exerted to compel the parties to do right but in order to obtain Government aid in their cooperative efforts and in order to assure the public that their interest in efficient continuous transportation service will be permanently protected."

Professor Rehmus then goes on to conclude, p. 8,:

> "The underlying philosophy of the law was, as it still is, almost total reliance on collective bargaining for the settlement of labor-management disputes."

The petitioner is correct in suggesting that the ultimate purpose of the Railway Labor Act is to prevent interruptions of service in two vital transportation industries. The means adopted by Congress to achieve this goal is, however, the collective bargaining process. Petitioner is wrong in fact and wrong in theory in suggesting that the Act supports imposition of change by fiat as the preferred means for preventing interruptions in transportation service.

At least implicit in the petitioner's management rights anti-bargaining theme is the notion that negotiations come only at the expense of expediency and efficiency. This is the same argument that is always made against a collective

or democratic process of decision-making and there have been those who have believed that the ultimate value is to "have the trains run on time" regardless of whether the rails ran right through the heart of democracy.

Congress made a determination that the carriers and their unions were responsible enough to be the authors of the legislation itself. That legislation leaves in the *joint* hands of the carriers and their unions the responsibility for administering labor relations. The major means authorized by the law is the collective bargaining process.

If the conditions of our society warrant the imposition of a drug testing program, it can be readily believed that such a program will be better designed and more effectively applied to employees when it is the product of the joint decision of carrier and union. *See Sadler and Horst,* "Company/Union Programs for Alcoholics", Harv. Bus. Rev.—Sept. Oct. 1972, p. 22. Such joint agreements have been reached in other industrial relations contexts (*see* extract from Seafarers International Union/Great Lakes contract attached hereto as an appendix) and there is no reason to believe that agreements will not be reached in those industries governed by the Railway Labor Act. Indeed, the drug testing program unilaterally implemented by American Airlines is invalid under the new FAA regulations, in part, due to its failure to provide sufficient safeguards against employee harassment and invasion of privacy. Moreover, the RLA does not permit either carrier or union to indefinitely thwart the will of the other. Upon the exhaustion of the RLA's procedures, the carrier has the right to implement the proposals it has made. The Act does not, contrary to petitioner's view, permit interminable negotia-

tions and dispute processing. The whole collective bargaining timetable is effectively in the hands of a Government Agency, the National Mediation Board.

That Board can make a decision that bargaining has reached an impasse or that mediation has failed and the parties must be "released" to take their own course. The Board has the authority and capacity to schedule negotiations and mediation sessions on an accelerated or deferred basis and no practitioner in the field will dispute the fact that the Board utilizes its discretion in these matters as its judgment is influenced by matters of public policy and public concern.

Finally, it is only a "scare" tactic used with the court to suggest that the bargaining procedures of the Railway Labor Act will inevitably result in destructive self-help. As we have noted, the vast majority of negotiated issues are resolved by mutual agreement. Even issues left to implementation by one of the parties will, if negotiations have been performed in good faith, bear the marks and modifications of the bargaining process and stand on a far more acceptable basis than a program unilaterally proclaimed and imposed. Moreover, petitioner's thesis assumes an irresponsibility of response by the unions which Congress did not share when it gave over to management and labor the administration of the Act. Petitioner, to make his argument, must posit a scenario in which the unions involved have acknowledged the existence of some species of drug problem, where there has been good faith bargaining and opportunities to review and revise a testing program, where the Federal Government has established by regulation at least the parameters of a drug control pro-

gram, and, notwithstanding all those considerations, the union calls a strike to cripple a carrier. Such a scenario runs contrary to common sense and reflects a numbness to the realities facing the working man and his unions. To name the demon, "strikes" are dangerous and difficult things. They involve the generation and maintenance of employee support; they put in jeopardy the employee's livelihood and benefits; they may well damage the corporate vehicle on which his job depends; they weaken the union's reserves of strength to press for other gains and benefits. In short, it staggers the imagination to believe that a strike would inevitably follow from unsuccessful negotiations held in good faith to define the drug testing program. If the carriers' program did not ultimately receive the agreement of the union, it would be far more likely that the union would simply leave to another day its further negotiations and attempts to modify a program.

Regulations have been issued by the various transportation agencies under the jurisdiction of the Department of Transportation requiring the carriers to establish drug testing programs. In each instance, the burden is put upon the carrier to develop a program for submission to the controlling agency. In some instances, e.g., 53 Fed. Reg. 47041, aspects of the program such as the development of an Employee Assistant Program, are specifically left to the collective bargaining process. Assuming that the regulations are valid, there is no reason why the requirements of the Railway Labor Act for joint development and administration of industrial relations policy cannot be harmonized with the substantive and procedural (time) requirements of the regulatory agencies. Not only will the purposes of all the applicable laws be served, but the end product is

bound to be better. *Norfolk and Western Railway Company* v. *Brotherhood of Locomotive Engineers*, 459 F. Supp. 136, 144 (W.D. Va. 1978). *See also Gulf Power Company*, 156 NLRB 622 (1966), *enforced sub. nom., NLRB* v. *Gulf Power Co.*, 384 F.2d 822 (5th Cir. 1967); *Plough, Inc.*, 262 NLRB 1095 (1982).

Dated:

Respectfully submitted,

SEHAM, KLEIN & ZELMAN

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APPENDIX

APPENDIX

Extract from SIU/Great Lakes Labor Contract

SECTION 42. *Drug Screening*: It is agreed that the Company, at its sole option without prejudicing its right to discipline, in order to provide for the safety and well-being of the employees of the Company, Company property, and the public in general, herewith establishes policy and procedures concerning substance abuse and drug testing while in the employ of the Company.

1. Substance abuse shall be defined to include:

a. The *abuse* of legal drugs, including prescription or over-the-counter drugs and alcohol.

b. *Use* of any illegal drug or chemical substance including marijuana, cocaine, heroin, amphetamines (speed). etc.

2. Employees may be required to submit to drug testing (urinalysis or breathalyzer) in the event reasonable grounds exist which indicate the employees involvement with substance abuse. Reasonable ground will include:

a. Irrational, insubordinate, or bizarre behavior which is not in keeping with good order and discipline.

b. Eyewitness reports which indicate that an employee may be using, distributing, possessing, or selling illegal or unauthorized prescription drugs.

c. Documented declining job performance.

d. Involvement in an accident or casualty where use of drugs or alcohol is suspected.

e. Proven evidence that the employee has a previous record of drug abuse.

f. Other reasons which may be mutually agreed upon by the Union and the Company.

3. When an employee is asked to submit a drug screen urinalysis test at the Company's expense, it shall be performed by a laboratory certified to perform such test. As soon as practical, the Union must be notified of the reasons for the test and the results.

4. If the employer refuses to submit to such a test under the circumstance defined above, the employee may be subject to discipline; however, if either the employee or employer wishes to pursue the matter any further, it should be referred to the Great Lakes Seamen's Appeals Board or processed through the grievance machinery, whichever is applicable.

5. If the employee agrees to submit to the test and the results are negative, the matter shall not be pursued any further, and the employee shall be compensated for any wages, benefits, or other contractual rights lost as a result of the testing procedure.

6. If the initial test results are positive, the employee shall have the right to have the sample used for the initial test retested a second time at employer's expense in another certified laboratory using the most accurate methods available.

7. If the results of the second test are positive, the employee shall have the option of *immediately* seeking rehabilitation at the Seaferers Chemical Abuse Center at Piney Point, Maryland or any other facility approved by the

GLSAB which may include short-term, out-patient treatment if evaluation indicates that to be appropriate.

8. If the employer chooses not to avail himself or herself of such an opportunity or he or she is unable to successfully complete such a program, either the employer or the employee can pursue the matter to the Great Lakes Seamen's Appeals Board or through the grievance machinery, whichever is applicable.

9. If the employee successfully completes a rehabilitation program as outlined above, the employee shall have absolute right to be reinstated to his or her job without loss of seniority.

10. A Company may exercise the provisions of this clause only after it has a written policy on employee assistance and chemical abuse and makes a copy of that policy available to the Union.